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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JOE MATTHEWS,

Defendant and Appellant.

2d Crim. No. B217241
(Super. Ct. No. F430177)
(San Luis Obispo County)

Joe Matthews appeals from an order of the trial court committing him to the State Department of Mental Health (DMH) for treatment as a mentally disordered offender (MDO). (Pen Code, §§ 2962, 2966.)¹ He argues that he did not qualify as an MDO because he did not receive at least 90 days of mental health treatment during the year preceding his parole release date. We affirm.

FACTS

On January 23, 2007 appellant lived in a storage facility he had rented for his belongings. He was discovered by an employee, who asked him to leave. A short time later, appellant attacked the employee with a knife, cutting his hand. He was convicted by jury of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1) and sentenced to three years in state prison.

¹ All further statutory references are to the Penal Code unless otherwise stated.

Appellant's earliest parole release date was January 11, 2009. The Board of Prison Terms (BPT) certified that he met the MDO criteria and appellant was admitted to Atascadero State Hospital (ASH). He filed a section 2966, subdivision (b) petition challenging his certification. Appellant waived his right to a jury determination and his MDO status was confirmed following a court trial.

Testimony of Doctor John F. Eibl

Dr. John F. Eibl is a forensic psychologist at ASH. He was qualified as an expert and testified that he had performed a forensic evaluation of appellant. Dr. Eibl met with appellant twice and discussed his case with his treatment team. He also reviewed appellant's mental health and criminal history records. Dr. Eibl diagnosed appellant as suffering from schizophrenia, paranoid type, and polysubstance dependence in full remission in a controlled environment. It was Dr. Eibl's opinion that appellant met all the statutory criteria for commitment as an MDO.

According to Dr. Eibl, appellant had a fixed delusion concerning the Mexican Mafia, witchcraft and believed his food was being poisoned. His severe mental disorder caused him to attack the victim. Appellant has not completed a substance abuse program or established a relapse prevention plan. According to his treatment team, appellant could not maintain himself in a less restrictive environment. He has little insight into his mental illness and has not followed his treatment plan.

Dr. Eibl initially testified that appellant received over 90 days of treatment during the year prior to his scheduled parole release date. He indicated that appellant received treatment from November 7, 2008, when he was sent to state prison, until his admission to ASH in January 12, 2009. The district attorney called to his attention that this time span was less than 90 days, and the court allowed Dr. Eibl several minutes to review his records.

Dr. Eibl relied on the report of Dr. Miculian, a psychologist with the DMH who had evaluated appellant in December 2008. Prior to trial, a question had arisen as to appellant's competency. He was sent to Patton State Hospital (Patton) where his

competency was restored so he could stand trial. On re-cross, Dr. Eibl noted conflicting dates in Dr. Miculian's report as to when appellant's competency was restored.

On redirect, Dr. Eibl indicated he was relying on Dr. Miculian's report, because he had no other records. Defense counsel objected on the grounds that the report was inadmissible and Dr. Eibl did not understand the issue about which he was being questioned. The objection was overruled. The court recessed to allow Dr. Eibl to "refresh his recollection" by reading Dr. Miculian's report, as well as the probation report. Dr. Eibl then testified to the following timeline:

Appellant was arrested on January 23, 2007, and held in Los Angeles county jail. On February 4, 2008, he was sent to Patton. He was restored to competency on May 8. On that date he was returned to Los Angeles county jail, while he stood trial. On November 7, appellant was sent to North Kern state prison and admitted to ASH on January 12, 2009. Dr. Eibl testified that, while in county jail, appellant received medication and group treatment. On re-cross, he admitted that he was unable to locate any statement in Dr. Miculian's report that appellant had received treatment in county jail.

Trial Court's Findings

The trial court found that appellant has a severe mental disorder that is not in remission and cannot be kept in remission without treatment. His severe mental disorder was an aggravating factor in the commission of the crime, which involved both the threat of force or violence and the actual use of force or violence. Due to his disorder, appellant represents a substantial danger of physical harm to others. The court concluded that appellant's combined treatment in Patton and state prison satisfied the 90-day requirement. It also made the specific finding that there was insufficient evidence to show beyond a reasonable doubt that appellant received treatment while in county jail from May 2008 until he was sent to state prison. The court denied the petition and ordered appellant committed to DMH for one year.

DISCUSSION

Appellant contends the evidence was insufficient to show that he received 90 days of treatment within a year prior to his scheduled parole date, as required by

section 2962, subdivision (c). He argues that the testimony of Dr. Eibl concerning the duration of his treatment was based on inadmissible hearsay--the report of Dr. Miculian. Appellant maintains the report was hearsay because the parties did not stipulate to its admission nor was it an official document certified by the custodian of records.²

When reviewing a claim of insufficient evidence under the MDO law, we evaluate the entire record in the light most favorable to the judgment and determine whether it discloses substantial evidence to support the finding that the defendant qualified as an MDO. (*People v. Beeson* (2002) 99 Cal.App.4th 1393, 1398; *People v. Valdez* (2001) 89 Cal.App.4th 1013, 1016.) The trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. (*Zhou v. Unisource Worldwide, Inc.* (2007) 157 Cal.App.4th 1471, 1476.)

An expert may rely upon inadmissible evidence to render an opinion on the criteria necessary for an MDO commitment. (*People v. Dodd* (2005) 133 Cal.App.4th 1564, 1569.) The expert may base his testimony on material not admitted into evidence if it is of a type that is reasonably relied upon by experts in his field. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618; Evid. Code, § 801, subd. (b).) In an MDO proceeding, reliable hearsay includes the statements of psychiatrists and other treating professionals as well as parole and probation reports. (*People v. Campos* (1995) 32 Cal.App.4th 304, 307-308 [treatment professionals]; *People v. Miller* (1994) 25 Cal.App.4th 913, 917 [probation report]; *People v. Dodd, supra*, 133 Cal.App.4th at p. 1569 [parole report].) For this reason, an expert "need not have personal knowledge of the matter as a prerequisite to testifying about it." (*Miller*, at p. 917.)

Dr. Eibl properly relied upon the report of Dr. Miculian and the probation report to establish the dates of appellant's treatment in order to ascertain whether he met

² Section 2966, subdivision (b) permits, upon stipulation by the parties, the admission of the declarations of certain treating professionals. Section 2981 provides that the requisite 90 days of treatment may be proved by records of the state or federal penitentiary, county jail, or state hospital, where those records have been certified by the official custodian. In this matter, the parties did not seek to admit evidence under either statute.

the 90-day statutory requirement. Although Dr. Eibl required a recess in order to examine both reports to establish a timeline, this did not render his testimony inadmissible. Dr. Eibl did not reveal the substantive contents of Dr. Miculian's report, but simply made a factual statement concerning dates of treatment.

An expert may not disclose contents of the report of nontestifying experts on direct examination, because this would deprive the adverse party the opportunity of cross-examination. (*People v. Campos, supra*, 32 Cal.App.4th at p. 308.) For this reason, the content of the reports may only be elicited on cross-examination. (*Ibid.*) Any reference to the language of Dr. Miculian's report occurred during defense counsel's cross-examination of Dr. Eibl.

Appellant next argues that the foregoing authorities are inapplicable because Dr. Eibl was testifying to a factual matter--the dates of treatment--rather than rendering an opinion as to appellant's mental state. (AOB 12-17, ARB 2) We disagree. Dr. Eibl, in his capacity as a qualified expert, testified that appellant met the statutory criteria to be certified as an MDO. Eibl had no personal knowledge of appellant's treatment history, so he properly relied on the reports that contained this information. An expert's opinion that a prisoner qualifies as an MDO necessarily requires his opinion as to all the statutory criteria. (*People v. Miller, supra*, 25 Cal.App.4th at p. 917.)

In support of his contention, appellant relies on three cases which are inapposite. They concern the manner in which the 90-day requirement may be satisfied, but do not address the means of establishing this information at trial. (*People v. Sheek* (2004) 122 Cal.App.4th 1606, 1611 [treatment must be for severe mental disorder, not untreated condition diagnosed during incarceration]; *People v. Martin* (2005) 127 Cal.App.4th 970, 975 [treatment in county jail may be considered in establishing 90-day requirement]; *People v. Del Valle* (2002) 100 Cal.App.4th 88, 93 [treatment need not be consecutive, but must be provided by DMH, not private outpatient facility].)

Dr. Eibl's testimony established that appellant was treated at Patton for 94 days (February 4, 2008 – May 8, 2008) and in state prison for 65 days (November 7,

2008 – January 12, 2009). Substantial evidence supports the trial court's finding that he received 90 days of treatment in the year prior to his scheduled parole release date.

DISPOSITION

The judgment (order of commitment) is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Roger Randall, Judge
Superior Court County of San Luis Obispo

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Sarah J. Farhat, Stephanie C. Brennan, Deputy Attorneys General, for Plaintiff and Respondent.